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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: DEC 17 2007

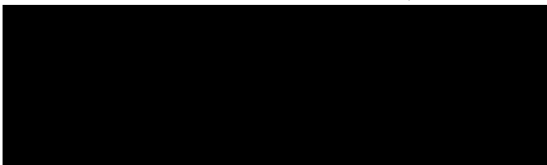
IN RE:

Petitioner:
Beneficiary:



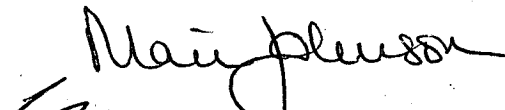
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a data infrastructure provider. It seeks to employ the beneficiary permanently in the United States as a software engineer manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petitioner seeks to classify the beneficiary as an alien of exceptional ability. The director concluded that the petitioner had not complied with the evidentiary requirements for *designation* as Schedule A, Group II (blanket certification) pursuant to 20 C.F.R. § 656.15(d)(1). The director did not consider whether the beneficiary qualifies for *classification* as an alien of exceptional ability pursuant to the regulatory requirements at 8 C.F.R. § 204.5(k)(3)(ii).

On appeal, counsel notes that the petition was not filed seeking Schedule A, Group II but rather relied on an individual alien employment certification approved by DOL and filed in support of an earlier petition in behalf of the beneficiary.

The original cover letter accompanying the petition did not reference Schedule A, Group II designation. Rather, counsel stated that the petition sought to classify the beneficiary as an alien of exceptional ability and was based on an approved individual alien employment certification filed in support of an earlier petition, SRC-06-198-50274, approved under a lesser classification.

Section 203(b)(2) of the Act allows aliens of "exceptional ability" to qualify for second preference classification. The director's confusion appears to arise from the two meanings of "exceptional ability." A petition seeking to classify a beneficiary as an alien of exceptional ability must be accompanied by an individual alien employment certification approved by DOL, a request for Schedule A, Group II designation *or* evidence that the alien employment certification requirement should be waived in the national interest. 8 C.F.R. § 204.5(k)(4). DOL has designated a blanket certification under Schedule A, Group II designation for aliens that meet DOL's definition of "exceptional ability." A petition seeking to classify a beneficiary as an alien of exceptional ability that is based on an approved alien employment certification, however, need not demonstrate eligibility for Schedule A, Group II designation. Thus, the director erred in considering the petition as one seeking Schedule A, Group II designation. We will not make a decision of first impression as to whether the beneficiary qualifies for classification under section 203(b)(2) of the Act as defined at 8 C.F.R. § 204.5(k)(2) pursuant to the evidentiary requirements at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, this matter will be remanded for consideration of that issue. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.